



OIFIG AN ARD AIGHNE
(Attorney General's Office)

BAILE ÁTHA CLIATH
(Dublin 2)

28 August, 1981

Dr. Garrett FitzGerald T.D.
An Taoiseach

Re: The right to life under the Constitution

Dear Taoiseach,

Declan Kelly has passed to me a letter which you received from Julia Vaughan. The Fine Gael Party has offered support for a proposal, made by the Life Amendment Campaign, "in order to guarantee the right to life of the unborn child".

It seems likely that the genesis of this perception is in a couple of articles which have been published notably by Rev. Maurice Dooley "Contraception and the Irish Constitution" on Volume 4 Social Studies 286, 289-290 (1974) and an article by William Binchy (Research Counsellor the Law Reform Commission published in Studies Winter 1977). Additionally the McGee case (1974 I.R. 284) has some relevance in relation to this preception. Certainly Binchy has argued that the decision may legitimately be identified as having implications in the area of abortion. The implications suggested are argued to stem from the fact that the McGee case imported into this country a concept of marital privacy - essentially from the United States. No doubt there was those who, on reading the McGee judgment, form the same opinion as Binchy did when he said "the fact remains that the concept of privacy asposued by that decision is a time bomb which, with changing attitudes, may yet explode in a manner which most of our citizens.....would deeply regret."

Perhaps it may serve some purpose if I could, as succinctly as possible, identify the issues for you before expressing my view upon them. The interpretation of the Constitution by the Courts has led to a situation where a large number of personal rights have been held to be implicit in the Constitution which are not specifically referred to there. These include that

1. The right to bodily integrity.
2. The right to have access and recourse to the Courts to litigate.
3. The right of an unmarried mother with regard to her child
4. The rights of an illegitimate child

5. The right to defend one's good name by appropriate means
6. The right to justice and fair procedures
7. The right to travel both within and without the State
8. The right not to have one's health put in jeopardy
9. The right to life.

It is my opinion that the right to life has been clearly enunciated by the Courts and that, in the circumstances, the constitutional amendment is unnecessary. For reasons that I shall amplify later I believe that it would be positively undesirable to amend the Constitution in this regard.

Since the publication of the article which, I suggest, may have given rise to the fears which are being voiced by the Campaign, the Supreme Court, or more particularly Mr. Justice Walsh, has been more explicit than either Kenny J. in *Ryan -v- the A.G.* (1965 JR 294) or than he was himself in the *McGee* case. He sets out that a child "has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth..... The right to life necessarily implies the right to be born, the right to preserve and defend, and to have preserved and defended, that right....". It has to be said that these findings were not made on issues which arose directly in the cases before the Court and consequently they did not call for any express comment from the other Judges. However it is normal that when one judge of a court makes specific findings in his judgment on an issue not directly before the court in a particular case a judge who disagrees or does not wish to be associated with, such a finding will express disagreement or, at least, a reservation on the matter until a decision on that particular issue is called for. No such disagreement or reservation was given by any judge in relation to the prohibition of abortion. In this regard it is worth noting that in the case *G. -v- An Bord Uchtala* other judges in the court expressly disagreed or reserved their positions on Judge Walsh's obiter in relation to the status of the proceedings before An Bord Uchtala. So, therefore, at least one judge of the Supreme Court is firmly of the view that the Constitution as it stands unequivocally forbids abortion and any law purporting to permit abortion will be repugnant and void. The silence of the other judges is strong but not of course conclusive evidence that the other judges think likewise. Further there is no evidence whatever that these other judges think otherwise than in accord with Walsh J.

Under these circumstances I oppose the intention to amend the Constitution. I have three substantive reasons:

1. It is my view as I have expressed it above that the right is already in the Constitution. If so can one have an amendment which is nearly a repetition of what is already in the Constitution? There is no direct authority on the matter but I believe that the Court might well set its face against such a process. Admittedly one could argue that it was a "for the removal of doubt" form of amendment which is common in statute law but unknown in the Constitution. On this ground alone I would not vehemently appose the proposal to amend.
2. There are other disadvantages however to proposing an amendment. Should the Constitution be amended to specify a right which hitherto has been found to be there contained in, though not specified in, the Constitution? If such an amendment were to take place what would be the position of the other unspecified rights? Obviously a strong argument would be that because the people considered necessary to specify one, by special amendment, and did not specify others, they wish to exclude the others. This maxim of construction "expressio eunius est exclusio alterius" is as old as the common law. I have some former guarantee of law of many of these rights, would no doubt, be considered highly desirable by most citizens and, without any doubt some such guarantee will be required if Ireland is to remain a party to the European Convention on Human Rights. If these rights be not contained in the Constitution then they will either have to be specified in the Constitution Amendment or in legislation. Either will require much work, may result in a more unwieldy constitution and all of this is in my view unnecessary.
3. The present position is that statutory criminal law prohibits abortion, attempting counselling and procuring aiding and abetting an abortion etc. Clearly the importation of such pages of criminal statutes into the Constitution is not contemplated. However a more "no law shall be enacted permitting abortion" type amendment of the Constitution will be without effect: such a law would be meaningless. What is required is a law, similar to our present criminal law, prohibiting abortion under penal sanction. An amendment of the Constitution declaring a fundamental right to life in the foetus from the moment of conception, is open to the objections set out in sub-paragraph (a) above and is also of little avail without an implementing penal code in the way as the Constitutional right to life is of little avail in itself to a murder victim without the arm of the criminal law to vindicate it. In summary, it is the criminal law that matters and the criminal law has no place in the Constitution. Treason is the only offence described in the Constitution (Article 39) and that only in a restricted form so that the law could not at will declare an action which did not find favour with the Government at a particular time to be treason.

All of the foregoing has to be taken in the context, additionally, with the general review which has been authorised at Cabinet level and the possible publicising of that review which has yet to be considered. I appreciate of course that the view which I have expressed may cause some embarrassment. I would be quite willing to so express it publicly as my advice should this be deemed desirable. You will appreciate the views which I have expressed here can be amplified to you if necessary.

Yours sincerely,

Peter D. Sutherland
Attorney General